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# In the Supreme Court of the United States

OCTOBER TERM, 1948

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No. 467

BENNETT E. MEYERS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the District Court (R. 7-11) denying the motion to dismiss the indictment is reported at 75 F. Supp. 486. The majority (R. 555B-571) and dissenting (R. 571-584) opinions in the Court of Appeals are not yet reported.

### JURISDICTION

The judgment of the Court of Appeals was entered November 8, 1948 (R. 585). On December 6,

1948, by order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to December 18, 1948 (R. 589). The petition was filed December 16, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner, who was accused of suborning the commission of perjury by one Lamarre before a Congressional subcommittee holding hearings in Washington, D. C., should have been indicted under the federal statute (18 U. S. C. (1946 ed.) 232, now 18 U. S. C. 1622) rather than under the local District of Columbia statute (22 D. C. Code (1940), 2501).

2. Whether the subcommittee was validly constituted.

3. Whether the evidence established that Lamarre made the statements to the subcommittee as alleged in the indictment, and was sufficient to prove the falsity of those statements.

4. Whether the trial court erred in permitting counsel for the subcommittee to testify to the substance of Lamarre's statements before the subcommittee, although a full transcript of the subcommittee proceedings was available.

5. Whether prejudicial error was committed in the prosecutor's opening statement or closing argument to the jury, or in the court's instructions.

STATUTES INVOLVED

The federal perjury statutes, 18 U. S. C. (1946 ed.) 231 and 232, Crim. Code, §§ 125, 126 (now 18 U. S. C. 1621 and 1622), provided as of the dates involved here:

> Sec. 231. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.
>
> Sec. 232. Whoever shall procure another to commit any perjury is guilty of subornation of perjury, and punishable as in section 231 of this title prescribed.

The District of Columbia perjury statute, 22 D. C. Code (1940), 2501, provides:

> Every person who, having taken an oath or affirmation before a competent tribunal, officer, or person, in any case in which the law authorized such oath or affirmation to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath or affirmation states or sub-

scribes any material matter which he does not believe to be true, shall be guilty of perjury; and any person convicted of perjury or subornation of perjury shall be punished by imprisonment in the penitentiary for not less than two nor more than ten years. Any such false testimony, declaration, deposition, or certificate given in the District of Columbia, but intended to be used in a judicial proceeding elsewhere, shall also be perjury within the meaning of this section.

STATEMENT

On December 19, 1947, a six-count indictment was filed in the District Court for the District of Columbia charging Bleriot H. Lamarre and petitioner with perjury and subornation thereof, respectively. The indictment alleged the creation in 1941 of a Special Senate Committee to Investigate the National Defense Program; the creation on April 19, 1947, of a subcommittee headed by Senator Ferguson to investigate the procurement of aircraft and aircraft material; and the jurisdiction of the subcommittee to examine witnesses under oath administered by Senator Ferguson. The first count alleged that on October 4 and 6, 1947, Lamarre testified falsely under oath before the subcommittee that petitioner was not financially interested in or connected with the Aviation Electric Corporation of Dayton, Ohio, during any of the years from 1940 to 1947, inclusive. The third count alleged that on the same dates Lamarre testified falsely be-

fore the subcommittee that a Cadillac automobile had been purchased for the Aviation Electric Corporation and for the use of the Aviation Electric Corporation. The fifth count alleged that Lamarre further testified falsely that the cost of redecorating petitioner's apartment in Washington, amounting to about $10,000, was a gift to petitioner from Lamarre. The second, fourth and sixth counts charged that petitioner suborned Lamarre to testify falsely as alleged in the first, third and fifth counts. (R. 2-7.) Lamarre pleaded guilty (R. 368). Petitioner moved that the indictment be dismissed on the ground that perjury before a Senate committee is not a crime under the local District of Columbia statute. The motion was denied. (R. 7-11.) After a jury trial, petitioner was convicted on all three counts pertaining to him and was sentenced generally to imprisonment for a period of twenty months to five years (R. 391-392).

The evidence for the Government relative to Lamarre's perjury and petitioner's subornation thereof may be summarized as follows:

1. *Petitioner's financial interest in the corporation.*—On October 4, 1947, Lamarre was sworn (R. 115-116) and testified before the subcommittee that petitioner organized the Aviation Electric Corporation of Dayton, Ohio, in September 1939, contributing all the initial capital of $500 (R. 144); that in January 1940 petitioner persuaded him to take over the management of the company which

was manufacturing aircraft parts (R. 125-133); that when he came into the company the stock was transferred to his name (R. 134, 138-139); that although he paid no consideration for the stock, he considered that it belonged to him from the time of the transfer (R. 144-148), but that he indorsed it in blank and turned it over to petitioner to secure large loans which petitioner made to the corporation to enable it to go into operation (R. 139-141); that he was the "boss" of the corporation (R. 143, 148) and that the corporation's debt to petitioner was paid off completely in 1941 (R. 141), as the result of petitioner's desire to terminate all connection with it (R. 267); that a further loan by petitioner to the corporation in March 1942 was paid off in October of that same year (R. 141, 230, 261, 267-268, 283). All other efforts of the subcommittee to get Lamarre to admit that petitioner had any other financial connection with the corporation prior to October 1942, or any such connection with it thereafter, were fruitless, and Lamarre gave various explanations of numerous corporate expenses about which he was asked (R. 116-288). On October 6, 1947, Lamarre again testified before the subcommittee as to petitioner's financial dealings with the company (R. 290-301, 317-326), but added nothing substantial to his previous testimony that petitioner owned no stock in the company after January 1940 and was not a creditor after October 1942.

At the trial Lamarre admitted that his testimony before the subcommittee was false (R. 507). He testified that petitioner put him into the company to protect petitioner's financial interests in it (R. 398-404); that petitioner was the owner of the company from the beginning to the time of dissolution (R. 404, 426, 437, 446, 464); that during his connection with the company over $150,000 was paid to petitioner out of its funds, exclusive of the amounts repaid to petitioner on loans (R. 492); that the payments were made under various guises in order to conceal petitioner's interest in the company (see, e. g., R. 414-415, 441-444, 447-450); that during petitioner's long absences from Dayton on army service, Lamarre sent him almost daily reports (R. 407-408). Lamarre further testified that the day before he appeared before the subcommittee, petitioner instructed him to tell it that petitioner had no interest in the company aside from the loans which were repaid before the end of 1942 (R. 502).

2. *The Cadillac automobile.*—At his first appearance before the subcommittee on October 4, 1947, Lamarre testified that the company owned a Cadillac, which had originally cost $3,000 and which he used on company business, and that in 1944 the car was sold to Curnutt, petitioner's father-in-law and an official of the corporation (R. 237-238). On October 6, 1947, he told the subcommittee that this "company car" (R. 323) was the only car which the company had; that he and Cur-

nutt were the only company officers authorized to use it; that it had remained in petitioner's garage in Washington for several weeks when bad weather prevented Lamarre from driving it back to Dayton; that title was in the company's name and payment for it was made with company funds; that petitioner made arrangements for the purchase of the car in Washington late in 1941 at Lamarre's request, because of the difficulty of getting cars; and that petitioner also took delivery and made arrangements for the insurance (R. 326-331).

At the trial Lamarre admitted that this story was false (R. 512). He testified that petitioner directed him to send company funds for the purchase of the car; that the company had no use for the car and never had possession of it; that it remained in petitioner's possession; and that title was eventually transferred from the company to Curnutt at petitioner's direction (R. 429-435). Lamarre further testified that the story he told the subcommittee was in accordance with instructions previously given him by petitioner (R. 501).

3. *The decoration of petitioner's apartment.*— On the morning of October 4, 1947, Lamarre was asked by the subcommittee what gifts he had given petitioner; he replied that his gifts to petitioner had never involved any substantial amount (R. 190-191). In the afternoon Lamarre volunteered that he desired to amplify his testimony on this subject. He then said that he had personally paid $10,000

for the redecoration of petitioner's apartment in Washington. He said at first that he did not regard this as a gift but rather as a moral obligation because petitioner had been so kind to him. (R. 194, 195, 197, 208, 232-233.) Under repeated questioning, however, he stated that he had offered to pay for the redecoration without any request by petitioner; that payment was made out of his own salary; that all his legal debts to petitioner had been paid at the time; and that it was actually a gift (R. 194-199, 232-234, 237, 268-269). On October 6, 1947, the subcommittee tried to get Lamarre to admit that the redecoration had been paid for with company funds at petitioner's direction (R. 302-317). But the witness insisted that he had paid the amount personally; that it was not in repayment of any loan from petitioner or part of any business deal; that it had no consideration; and that "in a legal sense, it undoubtedly would be a gift" (R. 309-310).

At the trial Lamarre admitted that this story was false (R. 507). He testified that payment for the redecoration was made from company funds at petitioner's direction (R. 424-426). He testified further that the story he told the subcommittee was concocted by petitioner and related by him at petitioner's direction (R. 501).

## ARGUMENT

1. Petitioner contends (Pet. 2, 12-13, 16-17, 22, 37-40) that perjury before a Congressional commit-

tee is a matter of national concern. He cites *Johnson* v. *United States*, 225 U. S. 405, to the effect that in cases of this kind the provisions of the District of Columbia Code were superseded by the adoption of the Federal Criminal Code. He argues that the proceeding against him was therefore fatally defective, since the indictment was brought under the provisions of the District of Columbia Code. The Court of Appeals rejected the contention, relying on two of its earlier decisions, *O'Brien* v. *United States*, 99 F. 2d 368, and *Behrle* v. *United States*, 100 F. 2d 714.

Regardless of whether petitioner is right in his contention that crimes of this nature should be indicted under the federal statute,[1] it does not follow that the error, if any, vitiates his conviction. The two statutes, federal and local, are substantially identical with the exception of the penalty provisions. The language of the indictment conforms to the rule requiring "a plain, concise and definite written statement of the essential facts constituting the offense charged,"[2] and it clearly states an offense within the federal statute. The only indication that the prosecution was brought under the local statute lies in the citation of that statute in the caption of the indictment (R. 2). A miscitation of

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[1] In the *Johnson* case, as petitioner points out (Pet. 39-40), the Government conceded as much. See *Johnson* v. *United States*, 225 U. S. 405, 413, and see the Government's brief in that case, No. 1075, O. T. 1911, at p. 10.

[2] See Rule 7(c), F. R. Crim. P.

the applicable statute in the caption is, of course, not ground for reversal unless prejudice is shown.[3] There was no prejudice. Petitioner was fully informed of the charge. The trial would have been conducted in the same manner, regardless of the citation given in the indictment. And the trial judge imposed a sentence within the maximum allowable under either the federal statute or the District of Columbia perjury statute (R. 391-392.)[4]

2. Petitioner contends that the subcommittee was not validly constituted and that consequently Lamarre could not have been guilty of perjury before it. He argues, first, that there was not a quorum on October 6, 1947, when Lamarre made his second appearance, because only two of the five members were present (Pet. 8-9, 29-30). The Court of Appeals agreed with petitioner in this (R. 568), but, we think, erroneously. Under the Constitution, the Senate has the right to determine its own rules. Art I, §5, cl. 2; and see *United States* v. *Smith*, 286 U. S. 6, 33; *United States* v. *Ballin*,

[3] Rule 7(c), F. R. Crim, P., provides in part: "Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice." See also *Williams* v. *United States*, 168 U. S. 382, 389; and *United States* v. *Hutcheson*, 312 U. S. 219, 229.

[4] Despite petitioner's statement to the contrary (Pet. 12-13), we are unable to find anything in the record to indicate that the question of the applicability of the federal statute was ever called to the attention of the trial judge. The motion to dismiss the indictment apparently was based on the contention that the local statute did not apply because a Congressional committee is not a "tribunal" (R. 7-10).

144 U. S. 1, 4. The Standing Rules of the Senate provide that the standing committees may fix for themselves the number required to constitute a quorum, provided it is not less than one-third of the entire membership.[5] The Government originally confined its evidence to Lamarre's testimony on October 4, 1947, when a majority of the subcommittee was present (R. 20-40). It was defense counsel who first brought out evidence that Lamarre reappeared before the subcommittee on October 6, 1947, and that only two senators were present at the time (R. 52-53), but counsel made no effort to discover whether two members were sufficient to constitute a quorum. In fact, his first reference to the matter appears to have been in his requests for instructions (R. 360-361). For all we know from the record, two members were sufficient. In these circumstances, and in view of the strong presumption of regularity in official action, we think it does not now lie with petitioner to challenge the validity of the meeting of October 6 in this respect.[6]

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[5] Rule XXV, 3, Standing Rules of the Senate. The House apparently follows a different practice. See Willoughby, *Principles of Legislative Organization and Administration* (1934), 363-366.

[6] In *Sinclair* v. *United States*, 279 U. S. 263, 296, this Court held that the presumption of innocence was stronger than the presumption of regularity when the issue was whether the questions asked a witness by a Senate committee were pertinent to any inquiry the committee was authorized to make. We think that decision is clearly distinguishable, for the matter was essential to the Government's case, whereas here the testimony given by Lamarre on October 4, 1947, was sufficient

Petitioner also contends that there was not a quorum present at the October 4 meeting. His argument runs as follows: the special committee as originally created in 1941 was composed of seven Senators; later in 1941 the membership was increased to ten; in the resolutions renewing the authority of the committee in later Congresses, no reference was made to the resolution which increased the membership to ten, and therefore the membership reverted to seven; two of the members of the subcommittee who sat on October 4 were appointed members of the special committee at a time when that committee already had its full quota of seven members; consequently, they were not validly members of the committee and could not be counted toward a quorum of the subcommittee (Pet. 2, 9-12, 16, 21-22, 30-33). The contention is obviously without merit. The special committee as originally created in the 77th Congress was a continuing one,[7] authorized to sit during "the Seventy-seventh and succeeding Congresses" (R. 112-113). The resolutions in the three succeeding Congresses, referred to by petitioner (R. 105-111, 333-340), continued the "authority" of the committee, but had nothing to do with its composition. To argue, from the mere fact of the failure in the

to establish the Government's case and no evidence of the events of October 6 appeared in the record until defense counsel introduced the subject.

[7] There is nothing in *Sinclair* v. *United States*, 279 U. S. 263, 295-296, cited by petitioner (Pet. 32), to indicate that Congress has no power to create such a continuing committee.

succeeding Congresses to mention the resolution raising the membership to ten, that the intent was to reduce it to seven is frivolous, especially in view of the fact that the presiding officer of the Senate, with the full knowledge of that body, continued during the succeeding Congresses to maintain the membership at ten by filling vacancies as they occurred (R. 335-340).

Petitioner's final contention on this phase of the case is that the subcommittee was invalidly constituted because it was created by the chairman of the full committee without authority of the committee (Pet. 2, 10, 14-16, 21-22, 33-37). But there was evidence that the full committee had authorized its chairman to appoint subcommittees (R. 45-49, 54, 83-84); that this particular subcommittee had been appointed by the chairman at a regular meeting of the full committee on April 19, 1947 (R. 81-82, 86); that the full committee had full knowledge of the functioning of the subcommittee (R. 76); and that it is an invariable custom in the Senate for committee chairmen to appoint subcommittees without any committee action whatever (R. 74, 82, 83, 87, 92-93). This Court has held that the courts may not interfere with Congressional rules of procedure unless they exceed constitutional restraints or violate fundamental rights. *United States* v. *Smith,* 286 U. S. 6, 33; *United States* v. *Ballin,* 144 U. S. 1, 5. Petitioner does not suggest any way in which his fun-

damental rights were violated by the manner in which the subcommittee was created.

3. Petitioner does not deny that Lamarre, at his behest, lied to the subcommittee. But, resting upon the dissenting opinion in the court below, he contends that the evidence was insufficient to prove the exact offenses alleged in the indictment (Pet. 2, 13-14, 22-23, 41).

The second count of the indictment, by reference to the first, alleged that Lamarre told the subcommittee that petitioner was not financially interested in the Aviation Electric Corporation during any of the years from 1940 to 1947, inclusive (R. 3-4). The dissenting judge below, noting that the proof showed that Lamarre actually told the subcommittee that petitioner was a large creditor until some time in 1942, concluded that the Government had failed to prove that Lamarre said what the indictment alleged he said (R. 577-580). But, conceding that a creditor in petitioner's position has a "financial interest," it cannot be doubted that Lamarre told the subcommittee, in substance,[8] that petitioner had no financial interest whatever in the corporation in any of the years following 1942, for he stated that petitioner disposed of all of his stock in 1940 and received full payment of his loans in 1942, and, though he was examined closely as to

[8] The indictment need not set forth the alleged false matter expressly. The substance of it is sufficient. 2 Wharton, *Criminal Law* (12th ed. 1932), §§ 1563-1564.

the corporation's affairs, he would not admit any further financial connection between it and petitioner (*supra,* pp. 5-7). We think this constituted sufficient proof of the matter alleged. One of the technical aspects of a perjury indictment is the "assignment," by which, after the testimony given under oath has been set forth, the indictment is required to state, specifically and distinctly, those parts of it which were false. 2 Wharton, *Criminal Law* (12th ed. 1932), § 1566; 2 Chitty, *Criminal Law* (1847) 311. Several assignments can be included in one count and proof of the falsity of any one of these is sufficient for conviction. 2 Wharton, *Criminal Law* (12th ed. 1932), § 1567. Consequently, it is unnecessary to prove that the defendant said all he is alleged to have said: "* * * if any material assignment be adequately proved, it is enough to support the indictment, if falsity be satisfactorily shown." 2 Wharton, *Criminal Law,* (12th ed. 1932) § 1582. In this case, the indictment charged that Lamarre testified falsely that there was no financial connection between petitioner and the corporation in any of the years from 1940 to 1947. Perhaps under former technical requirements the Government should have set up a separate assignment of falsity as to each of the years involved. But under the new Rules of Criminal Procedure, perjury indictments need no longer conform to the old technical requirements. *United States* v. *Bickford,* 168 F. 2d 26 (C.A. 9). We

think that in a case of this kind the indictment may properly group all the years in one assignment. Proof, then, as there indubitably was, that Lamarre had falsely denied any connection between petitioner and the corporation with respect to any one of the years specified in the indictment was sufficient to support the conviction, and it was not necessary, as the dissenting judge below thought, for the Government to prove all that Lamarre was alleged to have said.

The second count is alone sufficient to support the judgment of conviction, since petitioner received a general sentence which was within the limit which could have been imposed on any one of the counts. *Pinkerton* v. *United States,* 328 U. S. 640, 641-642; *Hirabayashi* v. *United States,* 320 U. S. 81, 85. Each of the other two counts, however, equally supports the judgment and we will show that the convictions on the other two counts are equally valid.

The fourth count alleged that Lamarre falsely told the subcommittee that a Cadillac car was purchased for the use of the corporation (R. 4-5). The dissenting opinion below, after reviewing the testimony given by Lamarre on October 6, 1942 (*supra,* pp. 7-8), states that it could not be determined with certainty whether Lamarre told the subcommittee that the car was purchased for the use of the corporation or for the use of petitioner, and concludes that a conviction for perjury could not be supported on such uncertain evidence (R.

580-582). But the dissenting judge appears not to have noticed Lamarre's testimony on October 6 that the car belonged to the corporation and that he and Curnutt were the only corporate officers authorized to use it. In any event, during his earlier testimony as to the car on October 4, Lamarre stated flatly that "It was the company car" and that he had used it as the company car (R. 237-238). We submit that the clear purport of Lamarre's testimony is that the car was purchased for the company's use.

The sixth count charged that Lamarre falsely testified before the subcommittee that payment for the cost of redecorating petitioner's apartment was a gift from himself, whereas in truth he knew that it had been made "out of the funds" of the corporation (R. 5-7). The dissenting judge below, noting that Lamarre actually told the subcommittee that payment had been made by company checks, though charged to his salary account, concludes that, literally, payment was made "out of the funds" of the company. The dissent then goes on to hold that Lamarre told the subcommittee what the indictment says was the truth, and that the indictment does not, therefore, raise an issue as to who actually stood the cost as between Lamarre and the company (R. 582-584). We think this is an exceedingly strained interpretation of the indictment. While the expression, "paid for out of the funds of" the corporation, may be ambiguous standing by itself,

the clear meaning of the indictment is that the company had stood the cost, and not simply that company checks, charged to his account, had been used by Lamarre. Furthermore, contrary to the view of the dissenting judge, the record is clear that the transaction concerning the redecorating which Lamarre described to the subcommittee, was legally a gift, though Lamarre endeavored to avoid that characterization (*supra*, pp. 8-9).

4. At the trial the first witness for the prosecution was William P. Rogers, who, as counsel for the subcommittee, had conducted the examination of Lamarre on October 4 and October 6, 1947. Over objection, this witness was permitted to state in substance the testimony Lamarre had given before the subcommittee in so far as it was pertinent to the charges of the indictment (R. 35-40). A copy of the transcript of Lamarre's testimony was furnished to defense counsel at the outset of this part of the examination of Rogers, and counsel thereafter based a large part of his cross-examination of the witness upon it (R. 35-37, 42-44, 50-51, 58-71). Later the transcript of Lamarre's testimony was put in evidence by the Government (R. 94). Petitioner contends (Pet. 2, 4-6, 18, 20-21, 23-25), and the dissenting judge below thought (R. 571-577), that it was a violation of the best evidence rule to permit these summations by the committee counsel when the stenographer's transcript was

available, and that the procedure was so unfair and prejudicial as to constitute reversible error.

The matter to be proved at the trial was what Lamarre had *said* before the subcommittee. The majority opinion below points out that the argument of the dissent is based upon a misconception of the best evidence rule, which is limited in its application in the federal courts to cases in which the contents of a *writing* are to be proved (R. 569-571). The dissent admits that this is true of the federal courts, cites numerous cases to show that it is generally true in the state courts also, and admits that on this very point, i.e., admission of the testimony of an eye-witness when a transcript is available, the authority is all against application of the best evidence principle. However, the dissenting judge argues that the rule has become outmoded by the scientific development of stenographic reporting and that it should, therefore, be changed. (R. 574-577.) Whatever may have been the early breadth of the best evidence rule, it long ago came to be strictly limited in the manner set forth in the majority opinion,[9] and, as Wigmore points out, the extension advocated by the dissenting judge is an innovation which the courts have frequently discouraged. 4 Wigmore, *Evidence* (3d ed. 1940), § 1330. We submit that there is a clearly defined and substantial basis for the limitation on the rule as

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[9] See quotation from Thayer in 4 Wigmore, *Evidence* (3d ed. 1940), § 1173; cf. also §§ 1174, 1177-1250.

it presently exists. Where there is question of proving the contents of a document, the document itself is the primary evidence of its contents, and in the nature of things must always be the best evidence obtainable. But where testimony is to be proved, the stenographer's transcript is after all only one of various means of proving what was said, and is not always and of its very nature the best evidence,[10] for it cannot reproduce the inflections and demeanor of the witness. In our opinion, there is no reason to change the long established and generally recognized rule.

The dissenting judge also thought it unfair to permit the witness Rogers to give a summation of Lamarre's testimony before the transcript was read to the jury (R. 571-574). The basis for this argument is that Rogers' summation was really an interpretation of what Lamarre said, designed to fit the terms of the indictment. A reading of Rogers' summations demonstrates that they were an accurate statement of the substance of Lamarre's testimony.

5. Petitioner also insists that he was deprived of a fair trial by the opening statement and closing argument of the prosecution and by the court's charge (Pet. 2, 6-8, 17, 25-29). The challenged

[10] In the present record, for example, the transcript gives the answer of the witness, Rogers, to an important question as follows: "They always are?" (R. 44.) The question mark is probably a mistake, but we cannot be certain as the transcript stands. The best evidence here would be the testimony of the bystanders who heard the witness.

passages in the opening statement (R. 362-363) were not objected to, and were at most "minor aberrations" in a prolonged trial. *United States* v. *Socony Vacuum Oil Co.,* 310 U. S. 150, 237-243. The statements in the closing argument to which objection is made (R. 363-364) were made in response to argument by defense counsel and were in no way improper. The charge of the court, when read as a whole, fairly presented the issues of the case (R. 364-380). We see nothing in petitioner's strictures on the charge requiring extended answer on our part. The majority in the court below found nothing in this portion of petitioner's argument meriting discussion (R. 569), and the dissenting judge, who dealt exhaustively with other points, had no fault to find in this respect.

## CONCLUSION

The decision of the Court of Appeals is correct and no conflict of decisions is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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